United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

B
P/S

76-1025

United States Court of Appeals

For the Second Circuit

76-1025

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH ANTHONY PELOSE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

WALL & BECK
Attorney for Appellant
36 West 44th Street
New York, New York 10036

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United States Attorney, for the
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

Index Joint Appendix

Docket Entries

20

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT JUDGE GRIESA

75 CRIM. 263.

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Jacob Laufer, U.S. Dept.
JOSEPH ANTHONY PELOSE	of Justice. 791-1160
	For Defendant:

(03) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed ✓	Marshal					
Violation	Docket fee					
Title 26						
Sec. 7203						
Failure to file corporate income tax returns.						
(Nine Counts)						

DATE	PROCEEDINGS
3-14-75	Filed information.
3-24-75 ✓	Adjourned to 3/31/75. Brieant,J.
3-31-75 ✓	Deft.(atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed at $10,000. P.R.B. Ordered photographed and fingerprinted. Case assigned to Judge Griesa for all purposes. Brieant,J.
4-10-75 ✓	Filed Notice of Appearance for Def't Pelose - La Rossa, Shargel & Fischetti, 522 5th Ave., NYC - Tel. # 687-4100
6-6-75	Filed Govt's Notice of Readiness for Trial.
9-16-75 ✓	PRE-TRIAL CONFERENCE HELD BY GRIESA ✓
11-3-75 ✓	Deft (Atty. James M. LaRossa). Trial with Jury began. (Adj'd to Nov 5th)
11-5-75 ✓	Trial Cont'd.
11-6-75 ✓	Trial Cont'd. ~~Adj'd to Nov 10, 1975 @ 10 AM.~~
11-10-75 ✓	Trial Cont'd.

DATE	PROCEEDINGS
11-11-75	Trial Cont'd. Jury Out.
11-12-75	Trial Cont'd and Concluded - Jury Verdict - GUILTY on all NINE COUNTS. PSI ordered. Santance adj'd to 9:30 A.M. Dec. 30, 1975. Bail cont'd. --GRIESA,J.
1-7-76	Filed transcript dated Nov.3,5,6,10,11,12, 1975
1-8-76	Filed Judgment(Atty.J.M.LaRossa,present)( )the deft is committed for imprisonment for a period of ONE YEAR on each of cts.1 thru 9 to run concurrent with each other..Deft is also fined $5,000 on each of Cts.1 thru 9 for a total of $45,000. This is a committed fine. Deft to be cont'd. on present bail pending appeal.....Griesa,J.....Ent.1-12-76.....
1-9-76	Filed notice of appeal from judgment dated Jan.8,1976..Copy to U.S.Atty. and to deft at 630 No.Broadway Yonkers,N.Y. 10701
1-29-76	Filed govts requests to charge
1-29-76	Filed Defts requests to charge
1-29-76	Filed Govts memo
1-29-76	Filed govts proposed exam of jurors
1-29-76	Filed defts memo
1-29-76	Govts memo of law
1-31-76	Filed appearance bond

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By G. E. Thompson
Deputy Clerk

Information

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v - :

JOSEPH ANTHONY PELOSE, :

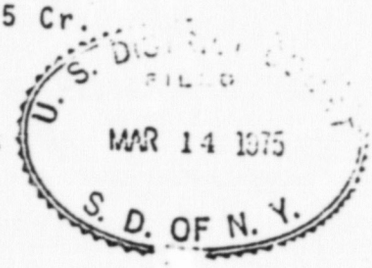
Defendant. :

----------X

JUDGE GRIESA
75 CRIM. 266

INFORMATION

75 Cr.



COUNT ONE

The United States Attorney charges:

That during the fiscal year ended July 31, 1969, JOSEPH ANTHONY PELOSE was the President of Jeath, Inc., a corporation not expressly exempt from tax, with its principal place of business at 230 West 230th Street, Bronx, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the fiscal year ended July 31, 1969, and on or before October 15, 1969, for and on behalf of the said corporation, which had gross receipts of approximately $220,194.63, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully, and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

60

COUNT TWO

The United States Attorney further charges:

That during the fiscal year ended July 31, 1970, JOSEPH ANTHONY PELOSE was the President of Jeath, Inc., a corporation not expressly exempt from tax, with its principal place of business at 230 West 230th Street, Bronx, New York, i the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the fiscal year ended July 31, 1970 and on or before October 15, 1970, for and on behalf of the said corporation, which had gross receipts of approximately $342,790.22, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully, and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT THREE

The United States Attorney further charges:

That during the fiscal year ended July 31, 1971, JOSEPH ANTHONY PELOSE was the President of Jeath, Inc., a corporation not expressly exempt from tax, with its principal place of business at 230 West 230th Street, Bronx, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHO. PELOSE was required by law, after the close of the fiscal year ended July 31, 1971 and on or before October 15, 1971, for and on behalf of the said corporation, which had gross receipts of approximately $406,134.41, to make an income tax return to the District Director of Internal Revenue for the Internal

70

Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT FOUR

The United States Attorney further charges:

That during the calendar year 1968, JOSEPH ANTHONY PELOSE was the President of Saw Mill Truck Rental, Inc., a corporation not expressly exempt from tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1968 and on or before March 15, 1969, for and on behalf of the said corporation, which had gross receipts of approximately $281,222.94, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT FIVE

The United States Attorney further charges:

That during the calendar year 1969, JOSEPH ANTHONY PELOSE was the President of Saw Mill Truck Rental, Inc., a corporation not expressly exempt from tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1969 and on or before March 15, 1970, for and on behalf of the said corporation, which had gross receipts of approximately $157,884.41, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, willfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT SIX

The United States Attorney further charges:

That during the calendar year 1968, JOSEPH ANTHONY PELOSE was the President of the H.V. Development Corporation, a corporation not expressely exempt from tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1968 and on or before March 15, 1969, for and on behalf of the said corporation, which had gross receipts of approximately $78,942.23, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the

9a

Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT SEVEN

The United States Attorney further charges:

That during the calendar year 1969, JOSEPH ANTHONY PELOSE was the President of H.V. Development Corporation, a corporation not expressly exempt from Tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1969 and on or before March 15, 1970, for and on behalf of the said corporation, which had gross receipts of approximately $262,563.86, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT EIGHT

The United States Attorney further charges:

That during the calendar year 1970, JOSEPH ANTHONY PELOSE was the President of H.V. Development Corporation, a corporation not expressly exempt from tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1970 and on or before March 15, 1971, for and on behalf of the said corporation, which had gross receipts of approximately $213,119.65, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, willfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

COUNT NINE

The United States Attorney further charges:

That during the calendar year 1971, JOSEPH ANTHONY PELOSE was the President of the H.V. Development Corporation, a corporation not expressly exempt from tax, with its principal place of business at 1205 Saw Mill River Road, Yonkers, New York, in the Southern District of New York, and by reason of such facts JOSEPH ANTHONY PELOSE was required by law, after the close of the calendar year 1971 and on or before March 15, 1972, for and on behalf of the said corporation, which had gross receipts of approximately $298,287.80, to make an income tax return to the District Director

of Internal Revenue for the Internal Revenue District of Manhattan, in the Southern District of New York, or to the Internal Revenue Service, North Atlantic Service Center, at Andover, Massachusetts, stating specifically the items of the corporation's gross income and gross receipts and any deductions and credits allowed by law, and that well knowing all of the foregoing facts, he did unlawfully, wilfully and knowingly fail to make said return to the said District Director, to the said Service Center, or to any other officer of the United States, within said required time.

(Title 26, United States Code, Section 7203)

Paul J. Curran

PAUL J. CURRAN
United States Attorney

Government's Requests To Charge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	75 Cr. 266 (TPG)
JOSEPH ANTHONY PELOSE, Defendant.	:	

GOVERNMENT'S REQUESTS TO CHARGE

The Government respectfully requests that the Court include the following in its instructions to the Jury:

GOVERNMENT'S REQUEST NO. 1

Failure to File - Statute and Introduction

The nine charges contained in the information are based on a statute of the United States which states that:

"§7203. Willful failure to file return, supply information, or pay tax.

> Any person required under this title ... to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to ... make such return, keep such records, or supply such information, at the time or times required by law or regulations is guilty of a crime."
> Title 26, United States Code, Section 7203.

OK

Each of the nine counts in the information alleges an offense against the United States. I shall analyze the components or elements of these failure to file charges that must be established in order for you to convict the defendant of failure to file tax returns on behalf of the corporations in question, Jeath, Inc., Saw Mill Truck Rental, Inc., and H. V. Development Corporation.

REQUEST NO. 2

WILFUL FAILURE TO FILE

The gist of the offenses charged in the information is wilful failure on the part of the defendant to file a return. To establish its case, the Government must prove beyond a reasonable doubt each of the following elements: (1) that the defendant was a person required by law to make a return on behalf of a given corporation for the year in question; (2) that he failed to file a return for that year at the time required by law; and (3) that the failure to file such return was wilful.

OK

United States v. McCormick, 67 F.2nd 867 (2nd Cir. 1933), cert.denied. 291 U.S. 662; Spies v. United States, 317 U.S. 492 (1943).

REQUEST NO. 3

Nature of the Crimes Charged

You all know the United States has a system for the collection of taxes and it is an honor system. We are each supposed to disclose to the collector what we say our taxes are. In other words, under our system each taxpayer is his own tax assessor and such a system can function successfully only if the taxpayer files a return and renders a true and honest account to the Government in connection with corporate income taxes.

Punctuality is important to the fiscal system, and the law provides sanctions to assure punctual as well as faithful performance of these duties.

Spies v. United States, 317 U.S. 495, 496 (1943)

REQUEST NO. 4

Duty to File

The Court instructs you as a matter of law that during the years in question in each count of the information, each of the three corporations, Jeath, Inc., Saw Mill Truck Rental, Inc., and H. V. Development Corporation, was not exempt from taxation and was required by law to file a corporate income tax return, and that such tax return was required by law to be filed within two and one half months following the end of a given corporation's business year.

Filing requirement: Title 26, United States Code, Section 6012(a)(2); Title 26, United States Code, Section 11(c); Title 26, United States Code, Section 501

Time of filing: Title 26, United States Code, Section 6072(b)

The law makes responsible for the failure to file a corporate return required to be filed "an officer or employee, of a corporation ... who as such officer ... is under a duty to perform the act in respect of which the violation occurs." --- in this case, the filing of the tax returns of the various corporations.

Title 26, United States Code, Section 7343

In order to determine whether the defendant, JOSEPH ANTHONY PELOSE, was a "responsible officer" of the various corporation such that he was required to make returns on behalf of those corporations when those returns came due, there are numerous factors which you may take into consideration.

REQUEST NO. 4 (Continued)

Duty to File

One such factor is that the law requires the following with respect to who must sign a return on behalf of a corporation:

"Section 6062. Signing of Corporation Returns

An income tax return required to be made by a corporation, shall be signed for the corporation by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to sign such return."

Lumetta v. United States, 362 F.2d 644, 648 (8th Cir. 1966)

Other factors which may be taken in determining whether or not Mr. Pelose was a responsible officer include whether or not he owned shares of a particular corporation; whether or not Mr. Pelose occupied a position as an officer of a particular corporation; whether or not Mr. Pelose directed its affairs, and made its decisions.

Bloom v. United States, 272 F.2d 215, 222 (9th Cir. 1959), cert. denied, 363 U.S. 803

REQUEST NO. 5

Time of Filing

With respect to Jeath, Inc., the corporation under consideration in Counts 1 through 3, inasmuch as that corporation had in previous years elected to operate on a fiscal year basis, with its fiscal year ending on July 31 of each year, the Court instructs you that the two and one half month period for filing required its corporate returns to be filed by October 15 of each year in question.

Title 26, United States Code, Section 441(e); (f)

With respect to Saw Mill Truck Rental, Inc., and H. V. Development Corporation, the corporations under consideration in Counts 4 through 9, the Court instructs you that, inasmuch as these corporations had not made such an election to operate on a fiscal year, their returns were required to be filed on the basis of a calendar year --- by March 15 --- following each year in question.

Title 26, United States Code, Section 441(g); Treasury Regulations Section 1.441-1(b)(3); (e)(2)

REQUEST NO. 6

Place of Filing

A return required to be filed on behalf of a corporation during the yeqrs covered by this information was required to be filed with the Internal Revenue district in which its principal place of business was located, or in an appropriate Internal Revenue Service Center.

Title 26, United States Code, Section 6091(b)(2)

REQUEST NO. 7

Willfulness

Now, we come to specific intent and willfulness. The specific intent of willfulness is an essential element of the crime of failing to make an income tax return. The term "willfully" used in the statute means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent, or negligent. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under this criminal law.

The failure to make a timely return is willful if the defendant's failure to act was volunary and purposeful and with the specific intent to fail to do what the law requires to be done; that is to say, with the bad purpose to disobey or disregard the law that requires him to disclose to the Government facts material to the determination of corporate income tax liability.

There is no necessity that the Government prove that the defendant had the intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of law. That is, the intention to avoid the law constitutes the crime charged by each of these counts as long as it is willful and knowing as I have defined the term for you. On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident, or due to his good faith misunderstanding of the requirements of the law, if there was such misunderstanding.

United States v. Hawk, 497 F.2d 365, 366-67 n.2 (9th Cir. 1974), cert. denied, 419 U.S. 838; See, United States v. Platt, 435 F.2d 789, 793-95 (2d Cir. 1970)

REQUEST NO. 8

Willfulness - Pattern of Conduct

In deciding whether or not the element of willfulness exists on these failure to file charges, you may consider whether the defendant's conduct has followed a pattern or shows a number of acts of similar nature.

If you find, for instance, that Mr. Pelose was required by law to file federal corporate income tax returns in each of the years charged in the information and that he failed to do so on more than one occasion, such a pattern of behavior, as distinguished from a single occurrence, might itself suggest willfulness.

In this connection, the Government urges that you consider the testimony of the employee of the Internal Revenue Service, that there is no record of the defendant having filed income tax returns, not only for the years charged in the information, but also for prior years.

If you regard the defendant's failure to file returns in the other years as substantially similar to his failure to file corporate returns in the corporate years charged in the nine counts of the information, then this evidence is relevant on the question of willfulness. The repetition of acts which are the same or substantially similar to those charged in the information tends to negate innocent explanations, such as inadvertence, accident or mistake.

In other words, such conduct of the defendant "might well bear upon [his] attitude toward thereporting and payment of taxes generally ... and thus be helpful in ascertaining [his] intent in failing to file [corporate] federal income tax returns."

See, United States v. Litman, 246 F.2d 206, 208 (3d Cir.), cert. denied, 355 U.S. 869 (1957).

REQUEST NO. 9

Other Factors Relevant to Determination of Willfulness

In determining whether the defendant's failure to file the various corporate tax returns at the required time was willful, you are entitled to take into account all the facts and circumstances which tend either to show or to rule out willfulness in the defendant's omission. For instance, you are entitled to take into account the evidence showing the defendant's general business acumen and from those facts you may infer that he has some general understanding that the Government requires corporations to file periodic income tax returns.

Adapted from United States v. Cirillo, 251 F.2d 638, cert. denied, 356 U.S. 949 (1958)

Moreover, in order to find that the defendant's failure to file the corporates' returns at the required time was willful, it is not necessary for you to find that the failure was motivated by an intent to conceal from the Government the amount of taxes owed by the various corporations nor, in fact, that any taxes were actually due.

United States v. Keig, 334 F.2d 823, 828 (7th Cir. 1964); Spies v. United States, 317 U.S. 492, 496 (1943); See also, United States v. Schipani, 362 F.2d 825, 831 (2d Cir.), cert. denied, 385 U.S. 934 (1966)

REQUEST NO. 10

Delegation of Preparation

There has been evidence introduced showing that the defendant as a practice did not prepare corporate tax returns but rather that they would be prepared for him by Walter Cole or Harold Parker, who are qualified to prepare federal tax returns for others.

If you find that the defendant provided Walter Cole with complete and correct information with relation to the income of the various corporations and that the defendant did not file tax returns in good faith reliance upon the advice of his accountant, to whom he had told all the relevant fact, then you will find the defendant not guilty.

If on the other hand you find that the defendant did not provide full and complete information to Cole, but instead omitted references to facts necessary and relevant for that accountant's assessment of the corporations' tax responsibilities than you are not required to find the defendant not guilty simply because, through the years he did not prepare tax returns himself but rather had them prepared for him by another, or because he visited an accountant in connection with the corporate returns. In this connection a defendant cannot blame, or shift responsibility for his own deficiencies to, the person he retains if he deliberately withholds from him vital information or takes positive action intentionally designed to mislead him.

Adapted from Devitt & Blackman, Federal Jury Practice & Instructions, Section 52,18 (1970 ed.) and from the charge of Judge Palmieri in United States v. Procario, 63 Cr. 431, at pp. 3132-33 of the minutes, aff'd, 356 F.2d 614 (2d Cir. 1966)

REQUEST NO. 11

Defendant's Interest
(Should the Defendant Testify on his own Behalf)

Obviously, the greater a person's interest in a case, the stronger the temptation to testify falsely. The interest of a defendant who takes the stand is of a character possessed by no other witness. Manifestly he has a very vital interest in the outcome of the case. This interest is one of the matters you may consider in determining the credibility of the defendant. Of course, you may find the defendant is telling the truth despite his obvious interest in the outcome, but you may consider the temptation to testify falsely in evaluating the defendant's believability.

United States v. Sullivan, 329 F.2d 755, 756-57 (2d Cir.) cert. denied, 377 U.S. 1005 (1964; United States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966)

REQUEST NO. 12

Character Evidence
(Requested only if Defendant Calls Character Witnesses)

Now, there has been testimony here regarding the previous good character of the defendant. Good character is to be weighed as a factor in the defendant's favor and you should consider it together with all the facts and other circumstances before you and then give it the weight to which you think it is entitled. When considered together with all the other evidence, the defendant's reputation for good character may, like other factors in his favor, generate a reasonable doubt as to guilt.

On the other hand, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he previously enjoyed a reputation of good character, does not justify or excuse the offense and you you should not acquit a defendant merely because you believe that defendant is a good person of good repute.

Adapted from, United States v. Kabot, 295, F.2d 848, 855 n.1 (2d Cir. 1961), cert. denied, 369 U.S. 803 (1962); See also, United States v. Schabert, 362 F.2d 369 (2d Cir.), cert. denied, 385, U.S. 919 (1966)

Furthermore, the testimony of a character witness is not to be regarded by you as expressing the witness' opinion as to the guilt or innocence of the defendant. The guilt or innocence of the defendant is for you, and you alone, to determine.

From the charge in United States v. Hiss, Trial Record, p. 3266, aff'd, 185 F.2d 822 (2d Cir.), cert. denied, 340 U.S. 948 (1951)

REQUEST NO. 13

Sympathy

As you enter upon the duty of determining the guilt or innocence of the defendant, let me recall to you once again the obligation which you undertook, an obligation supported by oath, to dismiss from your mind, to erase from your mind, every trace of prejudice, bias or sympathy. The emotions are not helpful in the determination of judicial questions. This is a court of justice and court of law. Your function is to find facts, to determine facts. You are not helped in the discharge of that duty by giving vent or permitting yourself to be swayed by prejudice, bias or by sympathy.

Adapted from the charge of Judge Rifkind in United States v. DeNormand, et al, page 304 of the Record on Appeal, aff'd at 149 F.2d 622

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

JACOB LAUFER
Special Attorney
U.S. Department of Justice

of Counsel

Court's Charge

Including

Exceptions and

Jury Deliberations

1h 1

11/11/75
Charge.
US v PELOSE

THE COURT: Ladies and gentlemen, you as the jury are about to enter on your final functions in this case. You are performing what is really a sacred obligation of citizenship. As I said at the beginning of the trial, you are obliged to perform your function in an attitude of complete fairness and impartiality, without the slightest bias or prejudice for or against the government, for or against the defendant.

This case is clearly of great importance to the government, since the enforcement of the criminal laws of this country is a matter of high concern to the nation and to the community. At the same time, this case is equally important to the defendant because of the obvious consequences of conviction for a crime; so what you are performing is a very important task to both sides.

I am not saying this to utter a platitude. I am saying this to make sure you understand that you are obliged to work hard and conscientiously at this case, which I know you understand already.

The fact that the United States government is a party to this action entitles it to no greater consideration than the consideration owed to a defendant. By the same token, the government is entitled to no less consideration. Indeed, both the government and the defendant are equals in this court, which is a court of justice to all parties.

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Your final role is to decide and to pass upon the issues of fact. You, the jury, are the sole and exclusive judges of the facts. You pass upon the weight to be given to different portions of the evidence. You determine the credibility of the witnesses. You resolve the conflicts in the evidence.

My function as the Court is to instruct you on the law, and it is your duty to accept these instructions on the law whether you may agree with them or not, and then it is your duty to apply the rules of law to the evidence and arrive at a verdict at the conclusion of your deliberations.

With respect to any matters of fact, it is your recollection of the evidence that governs. Each of the attorneys has given you his summation as to what he contends has or has not been proved in the evidence. But the summations are not in themselves evidence and are not to be substituted for your recollection of the evidence.

As I described to you earlier, and I am sure you recognize clearly by now, the evidence consists of the testimony admitted into evidence, the exhibits admitted into evidence and any stipulations which have been agreed upon, any stipulations of fact.

The fact that rulings have been made by me during the trial on procedural matters or on evidence matters or on

matters of law, the fact that occasionally questions have been asked by me, none of these things should be taken in any way to indicate any view of mine as to what your verdict should be. Nothing whatever in these instructions should be taken by you as an indication of what I think your verdict should be. My role is to instruct you on the rules of law, and your role is to find the facts and reach the ultimate verdict.

Just as I know you respect my role as the Court, I thoroughly respect your role and have no intention whatever of treading upon it.

I told you at the beginning of the trial, and I will repeat again now, the criminal charge here is in the form of what we call an information. But this document called an information which has been filed in the Court is merely an accusation. It is a charge. It is not evidence or proof of guilt. No weight whatever is to be given by you to the mere fact that an information has been filed against the defendant. It is the evidence in the trial that matters and the evidence alone.

The defendant has pleaded not guilty, which means that the government has the burden of proving the charges against him beyond a reasonable doubt. A defendant does not have to prove his innocence. He is in fact presumed to be innocent of the accusations contained in the information. This

lh 4

presumption of innocence was in his favor at the start of the trial, it is in his favor as I instruct you now, and it remains in his favor during your deliberations in the jury room. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

What do we mean by a reasonable doubt? Although this is a legal term, it really has a common sense meaning, but still perhaps a little explanation will help.

A reasonable doubt is a doubt founded in reason, arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which appeals to your judgment, your common sense, your experience.

But all of this is in contrast to some things which it is not. It is not caprice, whim, speculation, mere suspicion. That is not a reasonable doubt. It is not sympathy, a desire to avoid an unpleasant duty, personal feeling, that kind of thing.

The key word, of course, is reasonable. If after a fair and impartial consideration of all the evidence you say that you are not satisfied as to the guilt of the defendant, if you have a doubt which would cause you as prudent persons to hesitate before acting in matters of importance to yourselves,

lh 5

then you have a reasonable doubt, and in that circumstance it is your duty to acquit, to return a verdict of not guilty.

On the other hand, if after a consideration of all the evidence you candidly and honestly say that you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important matters in your own lives, then you can say that you have no reasonable doubt, and under those circumstances it is your duty to convict.

One final word on this subject. Proof beyond a reasonable doubt does not mean proof to a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty, would ever be convicted. It is practically impossible for any of us to be absolutely and completely convinced of any controverted fact, unless possibly in the realm of mathematics, or something like that. So the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, but not beyond every possible doubt.

As I said earlier, among your responsibilities is to decide what weight is to be given to the evidence, and included in this task is to decide on the credibility of the witnesses. How do you evaluate the credibility of the witnesses? As I already said I think at the beginning of the trial, in the first place, you bring into the courtroom with you your everyday

lh 6

common sense, your good judgment and your experience. You will bring these faculties to bear when you evaluate the witnesses and their credibility.

You have, of course, heard the witnesses on the stand and you have observed their manner of testifying. You will consider your basic impression as to whether or not each witness was telling the truth, was giving you a candid and accurate version of what occurred or was doing otherwise. In arriving at your basic impression of whether a witness was or was not telling you the facts, it is well to keep in mind that witnesses are human beings from a variety of walks of life and backgrounds. The ultimate question is not whether you have a personal like or dislike or a personal respect or disrespect for the witness as a man or a woman. The question as to each witness is whether in view of all the circumstances you believe that the witness has told you facts which you can rely on and which contribute to your knowledge of the factual picture in this case.

It is up to you as the jury to determine whether any of a witness' testimony is accurate and believable, whether all of it is or whether none of it is. In other words, according to your judgment, you may accept all of a witness' testimony, reject all, or if you believe that part of it is true and part of it is false, you can rely on the true part and reject the

lh 7

false. All of this is up to you in your good judgment and good common sense.

In judging the credibility of a witness you should consider his testimony, not in isolation, but in relation to all the other related evidence and ask yourselves how the testimony of a witness fits in or does not fit in with the other evidence.

Another factor to be considered in weighing the credibility of a witness is inconsistencies. To what extent were there inconsistencies or contradictions within a witness' testimony here in court? To what extent was the witness' testimony in court inconsistent with statements made outside on prior occasions? If there were inconsistencies or contradictions of any kind, how important or significant were they? Were they such as to cause you to disbelieve the witness' testimony in whole or in part, or are there innocent explanations for the inconsistencies or were the inconsistencies not important enough for you to discredit the essential parts of the testimony?

Another factor to be considered is whether you believe that a witness has such a bias or prejudice or interest in the outcome of the case or any other motive to cause him to testify falsely.

As I have indicated, a witness may be inaccurate, contradictory or even untruthful in some respects and yet be

lh 8

entirely credible in some other entirely essential and material parts of his testimony or her testimony. As I have said, it is for you to determine on the basis of all the factors that appeal to your good judgment and common sense whether a witness has testify truthfully in whole or in part or untruthfully in whole or in part.

As you know, the defendant did not testify in this case. Under our law a defendant in a criminal case has an absolute right to refrain from testifying, and the important thing for you as the jury to remember is this, that under our law no inference whatever can be drawn by you as the jury from the failure of a defendant to testify. That is, when you are determining or reckoning or tallying, or however you want to say it, the evidence in this case in favor of the government or not in favor of the government, I say this in this way because it is the government that has the burden of proof, but when you are considering what the evidence is in this case and the inferences that should be drawn from the evidence, you can place no reliance whatever and draw no inference whatever in that reckoning from the fact that the defendant failed to testify.

Let us come to the specific charges in the information. There are nine separate charges or counts, each relating to a specific alleged failure to file a specific income tax return.

Three of these relate to Jeath, Inc., that is counts 1, 2 and3, and these counts allege failure to file the income tax returns for that company for its fiscal years ending July 31, 1969, July 31, 1970 and July 31, 1971.

Counts 4 and 5 allege failure tofile income tax returns for Saw Mill Truck Rental, Inc. for the years 1968 and 1969. Saw Mill's fiscal year coincided with the calendar year, so it would end December 31.

Counts 6, 7, 8 and 9 allege that H. V. Development Corporation failed to file federal income tax returns for the years 1968, 1969, 1970 and 1971. Again, the fiscal year of H. V. Development Corporation coinci ed with the calendar year and thus ended December 31

Each count of the information alleges that defendant Joseph Anthony Pelose was president of the particular corporation and that he was required to see that the corporation filed its income tax return and that he wilfully and knowingly failed to perform this duty. You will have a copy of the information in the jury room during your deliberations.

You will see referred to at the end of each count a statutory provision described as Title 26, United States Code, Section 7203. This refers tc a statute enacted by the Congress of the United States which is part of the Internal Revenue Code. The statute provides in pertinent part as follows:

Any person required under the Internal Revenue Code to make a return, who wilfully fails to make such a return at the time or times required by law or regulations, is guilty of a crime.

The gist of the offenses charged in the information is therefore wilful failure on the part of the defendant Pelose to file tax returns [illegible]he corporations for the particular periods or to see that such returns were filed.

Th[illegible] purpose of the Congress in making wilful failure to file tax returns a crime is obvious. The filing of tax returns is basic to our entire system of collection of taxes. The responsibility under our system is placed upon the taxpayer to come forward with information in the form of tax returns, showing how the taxpayer calculates his income, deductions, profits or losses, and whether a tax is due or not due. Therefore, the filing of the tax return is the basic duty of the taxpayer under the system of tax collection in this country.

In the case of corporate tax returns it is clear that the responsibility must rest with individuals such as officer[illegible] or responsible employees.

Now let me describe to you the elements which the government must prove on each count of the information in order to establish the guilt[illegible] of the defendant Pelose. The government must prove beyond a reasonable doubt the following elements:

lh 11

First, that the particular corporation was required by law to file a federal income tax return for the year or fiscal year in question;

Second, that the defendant Pelose was a person who was under a duty to file or to see to the filing of the tax return on behalf of the corporation;

Third, that the return referred to in the particular count was not filed;

Fourth, that the defendant Pelose wilfully failed to file the return in question or see to it that such return was filed.

With regard to the first element, the duty of the particular corporation to file federal income tax returns, I instruct you as a matter of law that the corporations referred to were required by law to file corporate tax returns with the Internal Revenue Service for the years referred to in the counts in the information. Returns were required to be filed regardless of whether there was a profit or a loss for the year in question and regardless of whether there was a tax owing to the government.

In other words, the government was entitled to have the information in the returns so that it could collect taxes or audit to determine if more was due or take other appropriate steps.

It should be noted at this point that in each count of the information there is an allegation as to the gross receipts of the corporation for the year in question. The government and the defendant have agreed that these were the actual gross receipt figures.

As to the second element, the government is required to prove that the defendant Pelose was a person under a duty to see to the filing of the corporate tax returns. You may find that he was such person if you find that the government has proved beyond a reasonable doubt that the defendant Pelose was the president or principal officer of the corporation in question.

As to the third element, the failure to file the returns in question, I give you the following instructions. Under the law a tax return of a corporation is required to be filed within two and a half months after the end of the period to which it relates. Thus, the tax returns of Jeath, Inc. relating to fiscal years ending July 31 were required to be filed by October 15 of the year in question. The tax returns of Saw Mill and H. V. Development, both of which corporations were on calendar years, were required to be filed by March 15 of the year following the year in question.

Thus, when you see in the counts in the information reference to dates when the returns were to be filed, these

dates are correct as a matter of law. When I say that the returns were required to be filed at these times, I am of course referring to the requirements which exist in the absence of any extensions granted by the Internal Revenue Service. However, it is conceded that in this case no extensions were granted as to any of the returns. It is further conceded that none of the returns in question have ever been filed.

The principal issue in this case relates to the fourth element I described to you, whether there was a wilful failure on the part of the defendant Pelose to file or see to the filing of the tax returns in question.

The element of wilfulness is an essential element which the government must prove beyond a reasonable doubt in order to convict of criminal failure to file an income tax return. The term wilful as used in the statute means intentional, deliberate, purposeful, as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence is not sufficient to constitute wilfulness under this criminal statute.

What this means in this case involving charges of wilful failure to file income tax returns is as follows. The government must prove as to each count that the defendant Pelose knew that he was required to file the tax return referred to, and that he failed to file such return with the

wrongful purpose of avoiding this legal requirement.

The government seeks to prove the element of wilfulness by circumstantial evidence. The term circumstantial evidence is used in contrast to direct evidence. Let me define both these terms.

If a party is trying to prove in court that a certain event occurred, direct evidence of that event would be a witness testifying that he saw or observed the event occurring. Circumstantial evidence, on the other hand, is where one fact or perhaps a chain of facts gives rise to a reasonable inference of another fact.

If one fact or group of facts on the basis of common experience leads you logically and reasonably to infer other facts, then this is circumstantial evidence. Circumstantial evidence is no less valid and no less weighty than direct evidence, provided that the inferences drawn are logical and reasonable.

In a criminal case where the defendant's state of mind is at issue, where there are questions about what the defendant knew or intended, these questions often depend on circumstantial evidence because there is no means of directly looking into the defendant's mind and perceiving his thoughts.

Let me illustrate the use of circumstantial evidence to prove state of mind. Suppose Mrs. Smith's husband is in

1h 15

Europe on business. She finds on her husband's desk a bill for $150 from Macy's for a new suit. The bill was due on July 10 and it is now July 25. Did her husband just forget to pay the bill or did he intentionally fail to pay the bill because something was wrong with the suit?

Let us suppose that Mrs. Smith finds the bill unopened at the bottom of a pile of other papers. Suppose also that her husband had started wearing the suit and it was fine. Mrs. Smith could reasonably infer from these circumstances that her husband had lost sight of the bill and simply forgot to pay it.

But let us suppose that the bill is found opened, lying on top of the desk. Let us suppose that Mrs. Smith knows that her husband was working at his desk just before leaving for Europe and was paying some bills. Let us further suppose that Mrs. Smith goes to the closet and finds the suit with one pants leg nine inches shorter than the other. In this case Mrs. Smith can reasonably infer from these circumstances that her husband intentionally failed to pay the bill because the suit was defective.

She can do this despite the fact that she has no direct evidence in the way of her husband telling her what he intended to do.

In the present case you have heard evidence about a number of alleged circumstances: Pelose's business background

lh 16

and experience, Pelose's illness, Pelose's relationships with accountants Parker and Cole, the state of completeness or incompleteness of the records of the corporations, and so forth.

Evidence has been admitted to the effect that the records of the Internal Revenue Service show that for other years besides the years referred to in the information the corporations failed to file or were late in filing federal income tax returns. This latter information is summarized in Government Exhibit 45.

All of this evidence about illness, business experience, relations with accountants, failure to file other returns, is presented in this case solely as circumstantial evidence on the question of whether or not the defendant was wilful in failing to file the returns in question.

Let me give you certain instructions in this regard. In the first place, after you have considered the circumstantial evidence on any issue, if you believe that the evidence is equally consistent with innocent conduct as with guilty conduct, you must adopt the inference of innocent conduct. This results from the fact that the government has the burden of proving its case beyond a reasonable doubt.

On the subject of illness, there is, of course, no automatic excuse to taxpayers who are ill, relieving them of responsibility of filing income tax returns. But in a criminal

lh 17

case where the government must prove a wilful failure to file, the matter of illness is relevant on the question of wilfulness. In this regard consideration must be given to the nature of the illness, its duration, the extent to which the taxpayer withdrew from his normal business, the length of time there was such a witndrawal from business affairs, and other circumstances.

I mentioned a moment ago and you have heard discussion of the question of whether the records of these corporations were complete or incomplete. It is obvious that there is no automatic excuse for failure to file income tax returns on account of incomplete records. It is the responsibility of a taxpayer to make sure that sufficient records are kept in order to enable himself or his corporation to file federal income tax returns. However, the evidence in this case about the state of completeness or incompleteness of the records of these corporations is presented to you as part of the factual picture on this question of wilfulness as part of the circumstances that you are to consider. That is its only relevance in this case.

I will also charge you that the fact that a taxpayer may have delegated the preparation of the tax returns to an accountant is also no automatic excuse in and of itself for failing to file returns. Returns, even though prepared by an accountant, must normally be signed by the taxpayer, and it is

lh 18

the responsibility of the taxpayer to see that the returns are filed.

However, on the question of wilfulness you will consider, among other things, the evidence about Pelose's relations with his accountants. Pelose contends that during his illness and recuperation period he relied on Cole either to prepare the returns or get the necessary extensions and that for this and other reasons the government has failed to prove a wilful failure to file returns on the part of Pleose.

In this connection let me give you certain additional instructions. There has been a great deal of discussion regarding the testimony of Walter Cole. Cole testified that he wrote Pelose and talked to Pelose, reminding Pelose of the need to file returns and the need for records and information for the preparation of these returns.

The government contends that this testimony, if believed, establishes that Pelose was not relying on Cole to file returns or obtain extensions. The defendant contends that the testimony of Cole is not worthy of belief and contends that these letters and oral reminders were not given to Pelose, and also that Cole either had the information to file the returns or could easily have requested extensions.

It is up to you to evaluate the credibility of the testimony of Cole as well as the other witnesses. The point I

lh 19

make to you now is that if you should disbelieve the testimony of Cole, and I wish to make it clear I am not suggesting whether you should or should not, I am simply trying to illustrate a particular point, but, let me start again, the point I make to you now is that if you should disbelieve the testimony of Cole, you must still consider the significance of this determination in the light of all the other evidence.

In other words, the government's case does not stand or fall on the testimony of Cole or any other single witness. The same is true of the position of the defense. You must look at all the evidence.

It is perfectly appropriate for the government or the defense to come to court with alternative positions, and if the government has proven its case by one of two or more alternatives, that is sufficient. The lawyers have summarized their positions as to the evidence and I do not intend to repeat those summaries. I am simply instructing you on these points of law.

Now let me say a word about a subject which I will speak of as the time factor. As I said earlier, the particular tax returns in question were due two and a half months after the completion of the years which they related to. The earliest due dates were for the 1968 returns of Saw Mill and H. V. Development referred to in counts 4 and 6. These returns

lh 20

were due by March 15, 1969. Other returns referred to in other counts were due at various later times. The last of the due dates was for the 1971 return of H. V. Development, referred to in count 9. This return was due by March 15, 1972.

As you know, none of these returns haveever been filed. The information in this case was filed March 14, 1975. That is, the criminal action was commenced March 14, 1975.

The point I wish to make to you now is this. Let us suppose for purposes of illustration that because of the circumstances of illness, reliance on the accountant or because of some other reason you find that the government has failed to prove that Pelose had the requisite wilfulness back in 1969 and 1970 because perhaps he believed that Cole had obtained extensions. I am not saying that you should find this or not find this; I am simply trying to illustrate a point.

Let us further suppose for purposes of illustration that you find that by a certain time later he was -- by "he" I mean Pelose -- sufficiently recovered from his illness to handle business affairs, and because of a notice from the IRS or the institution of an investigation by the IRS, or for some other reason, he was at this later time no longer relying on Cole for having obtained extensions and knew that such extensions had not been obtained. Again I repeat that I am not

lh 21

saying that this is what you should find or not find. I am trying to illustrate a point which I think will become clear.

The point is, if you should find in the course of your deliberations that at such later time Pelose wilfully failed to file past returns after learning of the deficiency and the lack of extentions and failed to file the current returns due in 1972 or thereafter, then he would be guilty of wilful failure to file these returns, if you found the wilfulness existent at such later time under circumstances of the kind I have mentioned to you.

Let me also say a word about the government's evidence regarding the failure to file or late filing of other returns besides those referred to in the information. The evidence is that there were certain years prior to the years referred to in the counts of the information for which no returns were filed for Jeath, Saw Mill and H. V. Development.

Because of the statute of limitations, the government cannot bring a criminal charge regarding those earlier years, and you are not in any sense trying the defendant respecting those earlier years. You are not concerned at all with the legal reasons or any other reasons why the defendant is not being charged in this information with failure to file for those earlier years, and you are trying the defendant solely as to the counts in this information.

1h 22

But evidence has been presented to you as to failure to file or late filings in those earlier years. The sole relevance of this evidence is as circumstantial evidence on the question of wilfulness for the years referred to in the counts in the information. Specifically, you are entitled to consider the evidence about the earlier years as to whether there was a pattern of conduct tending to negate innocent explanations for the years in question, such as ill[illegible], reliance on Cole, and so forth. It is, of course, up to you to determine the significance of this evidence and whether or not it does in fact tend to negate innocent explanations and tend to show wilful conduct.

In conclusion, if you fail to find beyond a reasonable doubt that the law has bee[illegible]ted or if you fail to find beyond a reasonable doubt that the defendant has committed the offense referred to in the count you are considering, then you should not hesitate for any reason to find a verdict of acquittal or not guilty as to such unproved count.

But, on the other hand, if you should find that the law has been violated as charged in the particular count you are considering, you should, of course, not hesitate because of sympathy or any other reason whatever to render a verdict of guilty on that count.

Upon your oath as jurors, you cannot allow a

lh 23

consideration of the punishment which might be inflicted upon a defendant if convicted to influence your verdict in any way or in any sense to enter into your deliberations. The duty of imposing sentence rests exclusively upon the Court.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law without sympathy, fear or favor.

Ladies and gentlemen, when you proceed to your deliberations, please have in mind that each of you is entitled to your own sincere good judgment. At the same time, it is expected that you will exchange views with your fellow jurors. This obviously is the essential purpose of jury deliberation, to discuss and consider the evidence together and listen to the arguments of your fellow jurors. This means, of course, that you will present your own point of view as well as listening to and considering other points of view.

Any verdict rendered by you, either of guilty or not guilty on any count, must be the unanimous verdict of each one of you.

While the objective of your deliberations is to reach a verdict, if you can, and while you must be unanimous to render a verdict, each individual juror must cast his vote in good conscience, based on his own ultimate judgment, after

lh 24

considering all point of view and testing his own beliefs against those of his colleagues.

If you find during your deliberations that you need to hear any of the testimony read to you, you may send a note to the Court through your foreman. Your foreman can make out a note stating your request. There will be marshals outside the jury room and any requests or needs that you have to convey can be conveyed by your foreman through those marshals.

If you find that anything I have said in these instructions requires clarification or rereading, you may send a note through your foreman asking that this be done.

You will have the information in the jury room. You are entitled to have any and all exhibits which you request, but as to the exhibits we have found that it is helpful for the jury to decide which they wish, to request them through a note, and we will furnish them at that time.

Let me return to the question I mentioned earlier about rereading of testimony or instructions. Such a rereading is sometimes necessary, but it inevitably causes some interruption in your deliberations. What I would suggest is that before you send out a note asking that something be reread, trade your recollections. Sometimes if one or two people cannot remember something, somebody else in the jury can. So it is worth trading your recollections before you request a

lh 25

rereading of any material.

Juror Number One will be your foreman, unless she declines to serve, and then you will elect another one of your members as your foreman.

Any verdict you render, as I said, must be the unanimous verdict of each one of you, and the verdict should be rendered orally in open court by your foreman. When you are ready to announce a verdict, your foreman will send me a note stating that you are ready with your verdict. Please do not put the verdict in the note. Just announce that you are ready, and then the verdict will be announced in open court by the foreman, and the verdict will be guilty or not guilty as to each of counts 1 through 9, and will be announced as such.

If you would please hold your places for just a minute, I will speak to the attorneys and see if they have any points to be corrected or added to the charge, and then we will be right back with you.

(Continued on next page.)

(In the robing room.)

THE COURT: Who wants to go first? Mr. La Rossa?

MR. LA ROSSA: I respectfully take exception to the Court's failure to charge under United States against Bishop the wilfulness. United States against Bishop cited at 93 Supreme Court, 2008.

THE COURT: The language about the evil purpose?

MR. LA ROSSA: That's correct, sir.

THE COURT: Okay. I will deny that request.

MR. LA ROSSA: I respectfully except to that portion of the charge wherein the Court informed the jurors of the purpose of the Section. Is that sufficient for me to --

THE COURT: Yes. I will deny that exception.

MR. LA ROSSA: I respectfully take exception to the Court's charge with respect to the Mrs. Smith example.

THE COURT: I will deny that exception.

MR. LA ROSSA: I respectfully take exception to your Honor's statement to the jury that the delegation to an accountant of the filing of returns is not an excuse.

THE COURT: I will deny that exception.

MR. LA ROSSA: I respectfully take exception

1hkm 233

to your Honor's statement to the jury that the Government's case does not rise or fall on Walter Cole alone.

THE COURT: I will deny that exception.

MR. LA ROSSA: I respectfully take exception to the Court's statement under the time example which amounts to a directed verdict of guilty, I most respectfully submit.

THE COURT: I don't believe it does under any circumstances, and I won't change it.

MR. LA ROSSA: I respectfully take exception to your Honor's charge that the prior years could not be prosecuted because of the Statute of Limitations, and failure to follow the law under United States against Deaton.

THE COURT: What is that point?

MR. LA ROSSA: That the jury should have been informed that if there is a prior similar act, with respect to how it is used, your Honor informed them that the Government couldn't prosecute that prior year because of the Statute of Limitations. I respectfully submit that Deaton does not permit that.

THE COURT: What does Deaton say?

MR. LA ROSSA: Your Honor respectfully stated, and the manner in which you stated it, that it could show

propensity to commit a crime. That is not what Deaton permits. Deaton states quite emphatically that one may use prior similar acts on the question of intent and intent alone, and are not to be used to determine the guilt or innocence of the defendant on the respective crimes.

THE COURT: Is there a case specifically forbidding a reference to the Statute of Limitations? Does Deaton specifically --

MR. LA ROSSA: No, sir. But I most respectfully submit that that was error.

THE COURT: What does the Government say on that?

MR. LAUFER: I believe that your Honor has quite clearly stated on the record that the Government's proof is with regard to a specific element. Furthermore, in light of a recent opinion of the Second Circuit in United States against Torres and Rivera, there was not even a need for such limitation. If such prior criminal act evidence is admissible, the Court may simply rule that it is admissible for the jury to consider as it pleases, without limiting the jury's consideration of the proof to the element of wilfulness. The point being, your Honor, that the Government believes that your charge was fair.

lhkm 235

THE COURT: Mr. La Rossa, I think that the charge was quite emphatic, indeed repetitive, on the idea that the only alleged crimes to be considered here were the counts in the information. I am kind of a firm believer that the jury are adults and that they should be saved from unnecessary confusion. I will state that the reason I referred to the Statute of Limitations is to clear up confusion. This is a matter of law which is a matter of public -- the law is a matter of something that's in the public domain.

But beyond that, if I were on the jury, I think I could have some confusion about what was the status of those earlier years, and I wanted to make it clear that they were legally irrelevant to this case, and give some substance to that so that they were not possibly in a state of mystery, and possibly could construe the failure to prosecute for those years as creating some inference of some kind for or against the Government, for or against the Defendant, which wasn't warranted.

Anyway, we have talked enough about that. It really is there. Do you have any others?

MR. LA ROSSA: Yes, sir, I do. I respectfully take exception to your Honor's statement on the essential elements of the crime, stating that the question is

lhkm 236

whether the defendant Pelose failed to file the return or to see to the filing of the return in question. I take exception to the portion of the element that says "or to see to the filing of the return in question."

THE COURT: That exception is denied.

Mr. Laufer?

MR. LAUFER: No comments, your Honor.

(In open court.)

THE COURT: There is nothing further to be added or said with respect to the charge. At this point the jury will retire for their deliberations. The two alternates have to be excused. We appreciate your work as alternates. You were our insurance policy, and a very available insurance policy. If during any of these days one of the regular jurors had become ill or could not serve any longer for any other reason, why, the trial that far would have been wasted if we didn't have alternates to work in. At the point of the deliberations, only twelve jurors can deliberate and reach a verdict. The alternates are excused with the thanks of all of us.

(Two alternate jurors were excused.)

(One marshal was duly sworn.)

(The jury commenced deliberations at 1:22 p.m.)

lhkm 237

(At 3:00 p.m., in the robing room.)

THE COURT: There is a note received at 2:50 p.m. which we marked Court's Exhibit B.

(Court's Exhibit B was marked.)

THE COURT: You can see the note, but it says "For review, Exhibit 45, factor's checks, Mr. Pelton's, letters sent by Mr. Cole to defendant." Why don't you look at this. It is not a standard -- they are just items mentioned. So if there is any question of interpretation, we ought to have you all see that.

MR. LA ROSSA: You know the factor's checks are not in evidence.

THE COURT: Right.

MR. LAUFER: Perhaps they might simply want to review his testimony.

THE COURT: No, we do not want to suggest that.

MR. LAUFER: Exhibit 45 and the Cole letters which are 20 through 25, Mr. Sangara has.

THE COURT: As to the factor's checks, I think we just send them a note saying they are not in evidence, they were simply marked for identification. Okay?

MR. LA ROSSA: Yes.

(Pause.)

MR. LAUFER: Might it be appropirate to indicate

1hkm 238

that those checks were just to refresh Mr. Pelton's recollection?

THE COURT: No. Here is the note I propose to send, subject to your comments.

Dated 3:00 p.m., 11/11/75, "To the jury. Regarding your note sent at 2:50 p.m., we are sending the exhibits requested, except for the factor's or Mr. Pelton's checks which were merely marked for identification, and not received into evidence." Signed by me.

MR. LA ROSSA: That is fine, sir.

MR. LAUFER: Yes.

THE COURT: Agreeable to both sides?

MR. LAUFER: Yes, it is, your Honor.

(At 3:05 p.m., Court's Exhibit C was marked.)

(At 3:14 p.m., Court's Exhibit D was marked.)

(At 4:15 p.m., Court's Exhibit E was marked.)

(At 5:25 p.m., in the robing room.)

(Court's Exhibit F was marked.)

THE COURT: We have a note received just now, saying "Please send us date when IRS seized documents, records, and when they were returned." What do you propose

we answer to that?

MR. LAUFER: When they were returned, the closest we have is Mr. Bertolli's testimony is that he doesn't know it was 1973 or 1974, but thinks it was 1974.

THE COURT: He says he thought it was 1974.

MR. LAUFER: That was I think the parting testimony from Bertolli.

THE COURT: What about the first part of the question?

MR. LAUFER: I believe Benjamin Lewis testified that he contacted Goglio -- Special Agent Lewis contacted Goglio, or was contacted by Goglio in November of 1972. I recall from my questioning of him that -- I recall from my preparation with Mr. Lewis that he was going to testify that he was attempting to get records throughout early 1972, but I believe that your Honor curtailed that examination, and I don't know if it came out.

MR. LA ROSSA: Lewis testified that he received the checks from Goglio, and that would be the date, the appropriate day, if he so testified as to a date.

THE COURT: I have got my notes on Lewis' testimony, and let me see what I can do. He said that he was assigned in late 1972, he had his first communication with Goglio was in November of that year, telephone call,

1hkm 240

when Goglio said he had been retained as counsel for Mr. Pelose. Prior to that time there had been a request by the Service to Mr. Pelose to appear with corporate records. Goglio in the telephone conversation asked for a postponement of the appearance and the production of the corporate records, said he would send a power of attorney. That postponement was granted, Goglio said that he would get the corporate records.

In March, 1973 Lewis talked again to Goglio, Goglio said that Mr. Pelose could not be interviewed until Goglio had reviewed the records. As far as the returning, I think the only evidence is the evidence of Bertolli that the records were gotten back probably in 1974.

MR. LA ROSSA: Some time in 1974.

THE COURT: Let's start with you, Mr. La Rossa. What do you suggest in the way of an answer to this question?

MR. LA ROSSA: I suggest we tell them that IRS obtained the records in March, 1973 and the records were returned to Mr. Goglio some time in 1974, which is as specific as we can be.

THE COURT: I think that is what the record now shows.

lhkm 241

MR. LAUFER: The record shows that they first got part of the records in March, 1973. With respect to the entirety of the records, the Court record is barren, so I believe that might be a more accurate reflection of what time the IRS initially got or got all of the records. Apparently they did not get all of the records in March. With respect to the return, I wish your Honor would review your Honor's notes with respect to the final few words testified to by Mr. Bertolli to determine if he was all that certain it was 1974.

MR. LA ROSSA: At one point Mr. Bertolli said to you it could be 1973, but my recollection is it was 1974.

THE COURT: If we read the record, what we would come out with is his testimony that it was probably 1974. I don't think that's all that -- that makes sense. It doesn't make a lot of difference. If they got the records or started to get the records in March, 1973, they didn't return them immediately. So it was late 1973, early 1974.

MR. LAUFER: Your Honor, I can state that it is my recollection from what Special Agent Lewis told me, and this is not in the Court record, they were returned in August of 1973.

THE COURT: You should have brought that out. I can't go by that.

MR. LAUFER: I didn't view it as that critical at the time.

THE COURT: I don't think it is that critical. Would it be acceptable to both of you to say this, that the corporate records were produced to the IRS beginning in March, 1973 and were returned according to the testimony of Mr. Bertolli probably in 1974. Is that acceptable to you?

MR. LA ROSSA: I don't like the word probably, your Honor, because I think he said "it is my best recollection that it is 1974." I think that Mr. Laufer tied him down to it, and he said it could have been 1973 "but my recollection is it was 1974."

THE COURT: Nobody contends it was 1975. It was no later than 1974. The issue between you, Mr. La Rossa, and the Government, is that the Government would like to leave it open to an earlier date than 1974. For the life of me, I can't see any use at this time in that kind of a distinction. After all, the record is not -- if Mr. La Rossa is willing to have it stated to the jury that the evidence shows that the corporate records were produced to the IRS beginning in March, 1973

and were returned according to the testimony and the record in 1974, I think that would be a good resolution of this point.

MR. LA ROSSA: I agree. Exactly what you just said.

THE COURT: Even if we get into the "probably" thing, then we are leaving the jury wondering was it 1975, or something like that, which we don't want. Nobody contends that. I would like to present that. Let me cover this. I would like to at this point because of obvious reasons, I would like to inquire of the jury what their wishes are as to the evening. If they are going to deliberate this evening, we need dinner. I think they have had a pretty long day. I Think we want to get a view, if it is going to take a substantial amount of time, whether they would be better of working this evening or coming back tomorrow after a good night's sleep. Can I get --

MR. LA ROSSA: My suggestion is that they come back tomorrow. I think they had a long day.

THE COURT: I think so too. I think these marathon things are not particularly productive.

MR. LAUFER: I think if there is any reasonable likelihood of their being near some sort of a decision,

jhkm 244

it might be more useful to hold them perhaps another hour or so.

THE COURT: I would like to call them in and talk to them. If you have any objections to what I say, just come up to the bench. Really, basically, what I am going to say is the main thing is to get a good job done. We all know they have had a long day. They should seiously think of getting a good night's sleep as affecting their good clear decision on the matter. Then I will answer this question.

MR. LA ROSSA: Judge, can we take your words exactly as they were, that I agreed to? So there is no misunderstanding.

THE COURT: What?

MR. LAUFER: Your Honor said "How is this," and then you made the statement.

THE COURT: You mean on the answer to the question?

MR. LA ROSSA: Yes.

THE COURT: I think it is simple, and I will repeat it, we can get the reporter -

MR. LA ROSSA: If you would, I would appreciate it.

THE COURT: I would say in answer to their question that the records of the three corporations were

jhkm 245

produced to the IRS commending in March, 1973, and that they were returned from the IRS in 1974.

MR. LA ROSSA: Fine, sir.

MR. LAUFER: Would your Honor indicate that that is according to Mr. Bertolli's testimony, that they were returned in 1974?

MR. LA ROSSA: If you are going to do that, then you ought to tell them whose testimony it was they received it from. I think your Honor answered the question and I agree with the way it was done.

THE COURT: What do we add? We know the IRS had the records. I am going to answer it this way. I don't see any use at this time in any refinements.

(In open court, jury present.)

THE COURT: In response to your latest question, "Please send us date when IRS seized documents and records and when they were returned," in the first place, the IRS did not seize the documents. The documents were produced by the corporations pursuant to request. As to the time when that occurred, the documents were produced, the corporate documents were produced, commencing in March, 1973 and were returned by the IRS in 1974, according to the testimony in the record.

jhkm 246

Let me raise another point. It is about a quarter of six, and I would like you to consider what you feel should be done as far as your schedule from here on out. Basically, at this point we are in your hands. You know best the course of your deliberations, and it is really up to you to set your schedule within reason. The main point of your work is to do your job well, and time will have to yield to that.

For the sake of planning as to whether there should be provision for dinner this evening or what, we do need to know whether you wish to work further this evening, or whether you wish to adjourn now until tomorrow morning, or whether you think you would like to work a little longer and adjourn, or whatever you wish to do. Keeping in mind that the main point of your work is to do your job as well as you possibly can, you have had a long day, and you ought to realize that you are certainly welcome to adjourn now, and if you think you would benefit from a night's rest and resume your work tomorrow, you can do that. If you think you would be better off for the sake of continuity going on longer this evening, we will just trust your judgment.

You had the answer to your question, and then if you would go back in the jury room, discuss your

jhkm 247

schedule among yourselves and if you could, through your note from your Foreman, advise me as soon as possible of what your plans are, we would appreciate it.

Thank you.

(Court adjourned.)

(At 5:55 p.m., in the robing room.)

MR. LA ROSSA: May I say to you that the records were seized from the defendant corporations by the service of a subpoena.

THE COURT: Do you want me to clarify that? I will be glad to -- I thought seizure -- I didn't clear this with you, and I am sorry.

MR. LAUFER: Your Honor, they were not -- seized would be an inappropriate term.

THE COURT: Look, we can clear that up immediately.

MR. LA ROSSA: May I hear the note and then tell you?

THE COURT: Two notes in different handwritings. These are really questions: "If we adjourn, can we go home and come back tomorrow?"

Second note: "Can we have supper and then proceed with deliberation?"

I think they want to know whether they will be locked up in a hotel. I think what I would like to do is simply address a note and say that you can have supper this evening and proceed deliberating for a reasonable period of time. If you do desire to adjourn and go home, when that occurs, you can return to your homes. You think about whether you want any clarification --

MR. LA ROSSA: No, I do not.

(Court's Exhibit G was marked.)

(Pause.)

THE COURT: This would be a note, 6:00 p.m., November 11, 1975, "To the jury: In answer to your two questions: 1. If you adjourn this evening at whatever time you will return to your homes and come back tomorrow.

2. If you wish to continue deliberating this evening, you will eat out at a restaurant where arrangements can be made, and then you can come back and continue deliberating. In other words, as I said before, it is up to you to decide how to proceed. Please advise."

And I have signed it. Is that acceptable?

MR. LAUFER: Your Honor, I believe it is unclear with respect to the second alternative, whether if their fear is of being sequestered, whether they would

jhkm 249

be sequestered if they chose to stay further. I believe that perhaps that might be made clear to them --

THE COURT: I don't really think so.

MR. LA ROSSA: Number 1 says at any time.

THE COURT: Yes. Is this acceptable to you, Mr. La Rossa?

MR. LA ROSSA: Yes.

THE COURT: Let's have that delivered.

(At 6:12 p.m., in open court, jury present.)

(Court's Exhibit H was marked.)

THE COURT: Ladies and gentlemen, we have your last note saying that "We have voted to adjourn for the evening and return tomorrow morning."

You should be back here at ten o'clock tomorrow morning. When you are all here you can go right to the jury room and start your deliberations at ten o'clock. We won't have any session in court. But wait until you are all assembled before you do any deliberating.

A couple of things that are quite important. You only deliberate officially in the jury room. All discussions about the case should cease now, and not resume until you are all together tomorrow morning. It is just as important now as it ever was that you completely

jhkm 250

refrain from any discussions among yourselves or with your family or your firends of any kind, or viewing anything in the press or TV or radio, if that should come up, about the case. Completely avoid all that kind of thing this evening. No discussion until you come back together tomorrow morning at ten o'clock and you are all here.

You know now that there are no alternates, and, furthermore, even though you are going home for a rest this evening, your first responsibility above everything else is carrying out your responsibilities in this case.

So get a good night's rest, stay well and safe because there are no alternates. It is entirely your responsibility now. We will see you at ten o'clock tomorrow.

(Court adjourned.

1hkm 251

UNITED STATES OF AMERICA

vs. 75 Crim. 266

JOSEPH ANTHONY PELOSE

November 12, 1975
11:45 a.m.

(In the robing room.)

THE COURT: A note received at 11:36, which we will mark Court Exhibit I, saying, "Your Honor, we are hopelessly deadlocked," Signed by the Foreman.

(Court Exhibit I was marked.)

THE COURT: They have been deliberating from about 1:15 yesterday afternoon.

THE CLERK: 1:22, I believe it was.

MR. LAUFER: I believe they had lunch at that time.

MR. LA ROSSA: No, they didn't.

THE COURT: Whatever they did, they were sent to deliberate at about 1:15 or 1:30. Then we let them go home at about 6:15, wasn't it? They appeared at ten this morning, and we get this note at about a little after 11:30. They have been at it seven hours, roughly, six and a half, seven hours. What do counsel think?

MR. LAUFER: I would ask that your Honor give them a modified Allen charge, or something to the effect that they ought to continue their deliberations. I believe

lhkm 252

that it is quite possible they might ultimately be able to reach a verdict.

THE COURT: What do you think, Mr. La Rossa?

MR. LA ROSSA: I think if you want to call them in and say to them -- I don't know what you should say to them in effect when you get a "hopelessly deadlocked" note. I think that is what it means. I oppose an Allen charge at this point. I think you ought to let them go.

I might add that the total trial time I do not think was more than about four and a half days. I was once told by a former Chief Judge in this Court that the rule of thumb was one day per week. I don't know if that applies with every court.

THE COURT: For what?

MR. LA ROSSA: For deliberations. This was on the fifth day of a five-week trial that he informed me of it.

MR. LAUFER: I wonder, your Honor, whether a rule of thumb is appropriate in circumstances such as these. I think they ought to be given an opportunity to deliberate further.

MR. LA ROSSA: The only reason I say that, your Honor, is because I think your Honor will recall in your charge, it was broken down basically to the point

where there was really one element with respect to the entire nine counts, and we are talking about wilfulness. I think your Honor told them that almost every other aspect of the case had either been conceded or proved. We are talking about one specific element, and apparently that is what they are hung up on.

THE COURT: Yes, but when you have wilfulness, you have a pretty sophisticated issue, and you have got entirely circumstantial evidence, and I could see a jury conscientiously working on this case quite a long time.

You have got returns that were due over a period of I guess about three years, starting with March of 1969 and going to March of 1972. If the jury really thought this through, they would think of the chronology and they would think of the various issues in relation to that chronology. That's not a small job.

I have got an Allen charge here, I would like to just look at it for a minute, if you don't mind.

(Pause.)

THE COURT: As you all know, the principal element in an Allen charge is to do this: After cautioning them emphatically that the verdict has to be the considered judgment of all the jurors, you do ask them to consider the views -- you ask the minority to consider the views

of the majority. That's the real element of an Allen charge.

One possible way to handle this is to simply tell them, without delivering an Allen charge, to ask them to continue working.

MR. LA ROSSA: And to reexamine their own positions, without saying too much more. An awful lot of Judges, your Honor, may I state most respectfully, will not give that majority-minority factor to them. It has become known as a modified Allen charge. What in effect they say is why doesn't each of you go back in and reexamine the position that you have taken, and determine whether or not your position is consistent. Basically that's the thing they try --

THE COURT: I just don't regard this as a long deliberation. They may think they have -- they are deadlocked and they may think they have scanned everything as thoroughly as they should. I don't regard it as a long deliberation. As you point out, it is not a long trial, but it is a sophisticated issue, and there are lots of things for them to consider.

I think that they could stand further work, at least through --

MR. LA ROSSA: Your Honor will tell them, though,

lhkm 255

that they should not abandon their principles?

THE COURT: Of course. My inclination would be to just ask them to continue their work and not deliver the Allen charge, and reserve that until a little later point.

MR. LAUFER: The Government would have no objection to that, your Honor.

THE COURT: I am sure they will let us know. Let's do that. Let's bring them in, please.

(In open court, jury present.)

THE COURT: Ladies and gentlemen, I have a note from your Foreman which we received at about 11:35, saying that you are hopelessly deadlocked.

I have discussed with the lawyers, and what I would like to say to you is this, that the case started last Monday, the third, we had some breaks, but we had four days of presentation of evidence and then, as you know, the summations and the charge were yesterday. It represents a substantial effort on the part of everybody involved in this trial, and that is a factor to be considered.

I repeat what I said in my instructions yesterday, that any verdict that is reached on any count, whether

1hkm 256

guilty or not guilty, has to represent the considered judgment of each juror, but I think none of us at this point, at least neither the lawuers nor myself, are willing to give up and call it quits. We believe that it would be profitable and it is necessary for you to do some further work in the case.

What that consists of is hard to say because, of course, we have no idea of the course of your deliberations, and we are not entitled to know that. We are not entitled to know where you stand, and all of that is in your province.

But what we do ask you to do is to each of you, return to the jury room together, review the evidence further, consider your own positions in the light of the positions of others, and maybe there is some facet of the evidence that further discussion will bring to your minds that you have not focussed on yet.

I don't know what will come, but considering the type of issues we have here, considering everything involved, why, I don't really think that the length of the deliberations has been excessive, and I think it would be a good idea to attempt to carry out some further work.

The Clerk will assist you in ordering lunch in. We are happy to hear from you a little later, but I would

1hkm 257

like to have you go back and review, recanvass your positions.

However, I repeat what I have said several times, that no verdict can be anything but the judgment of each juror. I just ask you to work a little further on.

All right.

(At 12:05 p.m. the jury resumed deliberations.)

(At 12:50 p.m. in the robing room.)

(Court Exhibit J was marked.)

THE COURT: Here is the latest note, gentlemen.

MR. LAUFER: The checks are here, your Honor.

THE COURT: Note received from the jury at 12:36 p.m.:

"Your Honor, can we possibly obtain Government Exhibit checks to Pelose, cash and petty cash. We can not remember the number, and I think it would be beneficial for your charge to be heard again by the jury or read. Thanks," Signed by the Foreman.

All of those Exhibit 43 checks can be sent in, obviously. If they wish to hear the charge --

MR. LA ROSSA: I think we ought to send them

lhkm 258

a note asking them if there is any specific portion of it. It was an hour and ten minutes.

THE COURT: I don't think that's so terribly long.

MR. LAUFER: I think it might be more beneficial for them to hear the entire charge.

THE COURT: I just follow their request.

MR. LA ROSSA: May I at this time, your Honor, ask that your Honor eliminate from the charge those portions that were respectfully excepted to at the end of the charge?

THE COURT: No, of course not.

THE COURT: Lunch is supposed to be here at --

THE CLERK: Any minute.

THE COURT: They are hot sandwiches?

THE CLERK: Right.

THE COURT: I think we better let them eat. I will send them a note saying --

(Pause.)

THE COURT: This is the note I propose to send.

12:50 p.m., 11/12/75: "To the jury: In response to your latest note, the checks, Exhibit 43, will be sent to you. The charge will be read. However, since lunch will be arriving very shortly, I will wait

until after you have eaten your lunch before having the charge read to you." It is signed by me.

MR. LAUFER: No objection.

THE COURT: I will transmit that. I think we ought to all be ready to be with the jury beginning about I would say 1:30. I don't know when they will finish.

THE CLERK: I will check it out and find out, Judge.

(Recess.)

(At 2:07 p.m., in the robing room.

THE COURT: Lunch was apparently ordered at 11:30 and they have got a lot of orders from wherever this restaurant is, and lunch has not arrived. My plan, as you know from the note which we sent in a little before one, was to wait for the reading of the charge until after lunch. Apparenlty the lunch is just now leaving.

THE CLERK: They said it would be here definitely in twenty minutes before, when I spoke to them.

THE COURT: I don't think we ought to leave that jury in there without some word. I would be perfectly happy to have the Reporter start reading the charge now.

MR. LA ROSSA: May I know when the time was that you called, please?

lhkm 260

THE COURT: You called about three or four minutes ago?

THE CLERK: Just about five minutes ago.

MR. LA ROSSA: They said it would be here in twenty minutes?

THE COURT: Which I am sure it is a little optimistic.

THE CLERK: The boy has to come over here, until he finds the courtroom, it will take about a half hour.

THE COURT: I am very sorry for the jury not to have any food. I really can't do anything about that, and I think we better at least offer to start this reading.

MR. LAUFER: I think it might be useful to have the reading go in just one reading rather than break it.

MR. LA ROSSA: I think so too. I think they should be called in and have the charge read to them, and they can wait for lunch, or they can wait for their lunch.

THE COURT: Shall we ask them what they want to do? Let's bring them out. We will get an indication. They haven't heard from us for an hour and fifteen minutes or an hour and twenty minutes, and I think with no lunch

1hkm 261

we owe them a little bit of comfort.

THE CLERK: Would you like the marshal to indicate to them that lunch will be here in approximately a half hour --

THE COURT: No. Let's have them come out. I will just speak to them.

(In open court, jury present.

THE COURT: We sent in our last note to you at ten minutes of one, saying that you would have lunch shortly for you and then read the charge after lunch. I am absolutely appalled that lunch has not arrived, and I just convey my most extreme apologies. We have been calling this restaurant and they say that they have had really a flood of orders. I guess every time it even looks like rain the delivery places get a tremendous amount of orders.

I understand from the last note the jury would like to have the charge read. We are prepared to do that. I don't know what to do but to go ahead with that now. I think you are all in accord with that. The Reporter will read the charge, and we will proceed.

(Record read.)

THE COURT: Ladies and gentlemen, your lunch has arrived, so you can go back and continue your

lhkm 262

deliberations. I want to thank the Reporter. That was a really splendid and very clear reading of the instructions. Thank you very much.

(At 2:49 p.m. the jury resumed deliberations.)

(At 4:30 p.m., Court Exhibit K was marked.)

(At 5:30 p.m., in the robing room.)

THE COURT: We received a note just now which is marked Court's Exhibit L.

"Your Honor, we are going to sit and deliberate as late as it is necessary. Sorry. Please make arrangements accordingly. We hate any inconvenience this may cause anyone. Also, could the jury please have the portion of your charge relating to the word wilfully."

I understand that arrangements have been made to take them to dinner, right?

THE CLERK: That is in the process of being made.

THE COURT: It is 5:30. When would they be going to dinner?

THE CLERK: Figure approximately 7:00.

THE COURT: It wouldn't be good to take them now. They didn't have lunch until three o'clock. Now

lhkm 263

we have to figure out what portion of the charge relates to the word wilfully. That's going to be a big portion. What do you think, Mr. Laufer?

MR. LAUFER: I don't recall the exact context of the charge. I believe that your Honor indicated that there were many factors that they could consider in determining wilfulness, including prior acts and other things.

MR. LA ROSSA: I think with respect to the charge on wilfulness, it was rather short. I assume you are not going to go into the circumstantial evidence theme, I don't know that that directly relates to -- or the prior similar acts, I don't think that directly relates to it. I think the charge with respect to wilfulness is the description of what the word is.

MR. LAUFER: I believe your Honor gave a charge with respect to state of mind, the necessary findings for wilfulness, and the way in which wilfulness is found.

THE COURT: Mr. La Rossa is right, there was a breakdown in the basic fashion he states. There was the initial definition of what it means and then there was the lengthy discussion of the fact that this is proved by circumstantial evidence.

The Government's attempt here has been to prove

by circumstantial evidence, definition of circumstantial evidence, and then some special instructions about the different types of circumstantial evidence.

MR. LA ROSSA: I think your Honor gave the circumstantial evidence as you would in any charge, and then defined what it was and gave examples of it. But the wilfulness is the definition and what it means.

MR. LAUFER: Your Honor, the request is for the portion of the charge relating to the word wilfully, and not the entirety of the charge.

THE COURT: We can debate all evening about what the jury wants. The best way to do it is to ask them. If they want merely the definition, fine. If they want the whole business read, it is entirely up to them. I don't know anything to do but to ask them. I think the note is ambiguous.

(Pause.)

THE COURT: Here is a note. 5:35 p.m., 11/12/75. "To the jury: We are grateful for your willingness to deliberate as you described. There is no inconvenience. Arrangements have been made to take you to dinner in an hour or so. You ask about the reading of the portion of the charge relating to the word wilfully. As you recall, there was in my charge a short portion defining

the term and then an extended portion instructing you on various points regarding circumstantial evidence on the question of wilfulness. Would you please specify how much of this you wish read?"

Deliver that.

(Recess.)

(At 6:15 p.m., in open court, jury present.)

(Court Exhibit M was marked.)

THE CLERK: Ladies and gentlemen of the jury, Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant Joseph Pelose on Count 1?

THE FORELADY: Guilty.

THE CLERK: On Count 2?

THE FORELADY: Guilty.

THE CLERK: On Count 3?

THE FORELADY: Guilty.

THE CLERK: On Count 4?

THE FORELADY: Guilty.

THE CLERK: On Count 5?

THE FORELADY: Guilty.

THE CLERK: Count 6?

lhkm. 266

THE FORELADY: Guilty.

THE CLERK: Count 7?

THE FORELADY: Guilty.

THE CLERK: Count 8?

THE FORELADY: Guilty.

THE CLERK: Count 9?

THE FORELADY: Guilty.

THE COURT: Does the defendant wish to have the jury polled?

MR. LA ROSSA: I do.

THE COURT: Would you poll the jury?

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you found defendant Joseph Pelose guilty on Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9.

(To the question "Is that your verdict?", all the jurors answered in the affirmative.)

THE COURT: Ladies and gentlemen, I wish to thank you for your work again. From the questions and from your obvious attention during the trial and your attention during the re-reading of the charge, and the length of time you have deliberated, it is obvious you have done a remarkable job here. I am really moved by what you have accomplished as very good citizens, and

1hkm 267

I wish to thank you in the strongest way I possibly can.

You should retire to the jury room. Mr. Sangara will provide you with whatever forms you need, and the marshal will escort you onto the elevator and out of the building. I don't imagine there would be any occasion for any lawyer to speak to you about the case. If for any reason -- if there was ever any occasion, any questions were asked by anybody about this case, we tell this to every jury at the end of the case, you are free to speak or not speak, and under no circumstances should anybody attempt to communicate with you and harass you in any way. I am sure that would never occur in any event. I am not even suggesting that it might, but after a jury has deliberated, they should be at peace and go their way, and that's the way we want you tonight.

So good night, thank you very much. I will hold the lawyers and the parties.

(The jury was excused.)

THE COURT: Are there any motions at this time, or do you wish to reserve on that?

MR. LA ROSSA: I wish to reserve on any motion addressed to the Court under Rule 29 C until the date of sentence, if I may, your Honor.

THE COURT: That is perfectly fine. Let's set

a sentence date.

I will set the sentence for December 30, at 9:30 in the morning, and that will be in this room, here in this courtroom.

It has been a long wait, and I want to thank the lawyers again. I think I thanked you both informally for your summations and your other efforts. We will adjourn now until the 30th.

MR. LA ROSSA: May Mr. Pelose be permitted to call Probation tomorrow as opposed to trying to reach them tonight?

THE COURT: Absolutely.

MR. LA ROSSA: I think he is awfully tired.

THE COURT: No question about it.

I always forget to formally order presentence reports. I think that goes without saying.

MR. LA ROSSA: I will see to it that he --

THE COURT: Obviously that's a perfectly sensible thing to do. So you arrange a convenient time for him to be in touch with the Probation Department.

MR. LAUFER: Your Honor, the Government would have no objection to bail being continued in the amount presently set.

THE COURT: Fine. That will be continued.

Thank you all very much.

(Court adjourned.)

Excerpts From

Sentencing Minutes

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

THE UNITED STATES OF AMERICA

vs.

JOSEPH ANTHONY PELOSE,

Defendant.

----------X

75 Cr 266

January 8, 1976
9:30 a.m.

Before: HON. THOMAS P. GRIESA,
District Judge

APPEARANCES

THOMAS J. CAHILL, ESQ.

United States Attorney for the
Southern District of New York

BY: JACOB LAUFER, ESQ.
Assistant United States Attorney

JAMES M. LaROSSA, ESQ.,

Attorney for defendant.

I believe, however, that this is a situation where, as far as the offense is concerned or the offenses, there are no mitigating factors.

I heard the defense at the trial to the effect that the failure to file the returns was caused by reliance on the accountant or accountants, and in combination with

the circumstances of the illness. The jury rejected that defense. I think the jury was emminently justified in rejecting that defense and I believe in connection with the sentence that I must state that there was no substance to that defense whatever.

The fact of the illness, of course, is established, but in my view this was a situation where Mr. Pelose was not misled by his accountant for purposes of obtaining credit and otherwise. His accountant was subject to his direction and Mr. Pelose well knew that his returns were not being filed and was fully responsible for the failure to file them.

If there was any innocent failure to file temporarily because of the illness, there was surely no innocent failure to file during most of the years where there was an opportunity to file prior to the indictment. This was a deliberate refusal to comply with the law requiring the filing of income taxes, it was a deliberate calculated failure to file, it was obviously caused -- and this is from the proof at the trial not any suspicion or conjecture -- these failures to file were the result of a calculated desire and stratagem to conceal from the government financial information and financial transactions which Mr. Pelose sought to conceal from the government.

Under these circumstances, there is simply no mitigating circumstance relating to these offenses, and indeed, this is an aggravating situation of failure to file income tax returns.

One might argue that there is, in this case, justification for imposing the maximum cumulative penalties under the law, and that would be a total of 9 years in prison and $50,000 in fines. That, of course, would be excessive, almost under any view, and there are mitigating circumstances with respect to Mr. Pelose's age, his state of health, and the information about good works aside from this offense. I have particular reference to the operation on this throat which occured in late 1968 and which has left him with the need for a special mechanism with respect to his speech and his breath.

I believe that for a man of his age and the condition of his health, imprisonment is undoubtedly more onerous and more difficult that for other persons. However, I think it would be a mockery of the law and a mockery of justice to not impose some moderate prison term in this case.

Under all the circumstances, I am imposing, in addition to the prison term which I regard as moderate, I am imposing fines which I think are required.

Judgment & Commitment

Appealed From

United States of America vs.

United States District Court for
SOUTHERN DISTRICT OF NEW YORK

DEFENDANT: JOSEPH ANTHONY PELOSE

DOCKET NO.: 75 Cr 266

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/76)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: January DAY: 8, YEAR: 1976

[ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL — JAMES M. LA ROSSA, ESQ. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of **unlawfully, wilfully and knowingly failing to file Income Tax returns on three Corporations of which he was President during the years 1968 thru 1971, as charged on Counts 1 thru 9.**

26, USC, §7203

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ONE YEAR on each of Counts 1 thru 9 to run concurrent with each other. Defendant is also fined $5,000 on each of Counts 1 thru 9 for a total of $45,000. This is a COMMITTED FINE. Defendant to be continued on present bail pending appeal.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE January 8, 1976

By Tom Zaccaro
( ) CLERK
( ) DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

THOMAS P. GRIESA

Date January 8, 1976

File

Notice of Appeal

100a

FILED

JAN 12 11 PM '76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

v.

No. 75 CR 266

JOSEPH ANTHONY PELOSE,

NOTICE OF APPEAL
(T. P. G.)

Defendant.
----------X

S I R :

PLEASE TAKE NOTICE that Joseph Anthony Pelose hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of Conviction entered against him by the Hon. Thomas P. Griesa, United States District Judge for the Southern District of New York, on January 8th, 1976, wherein the defendant was convicted of nine counts of violating Title 26, United States Code, Section 7203 and sentenced upon said conviction to

Dated: New York, New York
January 8th, 1976

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant
Office and Post Office Address
522 Fifth Avenue
New York, New York 10036
687-4100

TO:
HON. THOMAS CAHILL
United States Attorney
Southern District of New York
United States Attorneys Office
One St. Andrews Plaza
New York, New York

By: James M. La Rossa
JAMES M. LA ROSSA
A Member of the Firm

Defendant's Address:
630 No. Broadway
Yonkers, New York 10701

Service of ~~three~~ Two (2) copies of the within
is admitted this 11 day of March 1976

COPY RECEIVED
MAR 11 1976
ROBERT B. FISKE JR.
U.S. ATTORNEY
SOUTHERN DIST. OF N.Y.

United States Attorney for the Southern District of New York
Attorney for Appellee